# PLACER COUNTY AIR POLLUTION CONTROL DISTRICT BOARD OF DIRECTORS

## Thursday, August 9, 2007 2:30 P.M.

#### **Meeting Minutes**

The Board of Directors of the Placer County Air Pollution Control District met in session at 2:30 P.M., Thursday, August 9, 2007 at the Placer County Board of Supervisors' Chambers, 175 Fulweiler Avenue, Auburn, California. Representing the District was: Tom Christofk, Air Pollution Control Officer; Yu-Shuo Chang, Planning and Monitoring Manager, and John Finnell, Senior Air Pollution Control Engineer.

- 1. Call to Order: Chairman Holmes
- 2. Flag Salute:
- 3. Roll Call / Determination of a Quorum

Present: Mike Holmes, Tom Millward, Jim Holmes, Kent Nakata, Peter Hill,

Kirk Uhler and Jim Gray

Absent: Robert Weygandt and Sherrie Blackmun

**4. Approval of Minutes:** June 14, 2007 Preliminary Budget and Regular Board Meeting.

**Motion:** Peter Hill, second: Jim Gray; approved with one abstention, Kirk Uhler, who was not in attendance at the June 14, 2007, meetings.

- **5. Public Comment:** No public comment
- 6. Synopsis of Agenda (information only, no action needed)
- 7. Approval of Agenda:

**Motion:** Jim Gray, second: Kent Nakata; approved unanimously

Consent Calendar Items: (Item 8, 9 & 10)

#### 8. Public Outreach and Media Support Contract: (Consent/Action)

Approve and sign Resolution #07-04 thereby authorizing the Air Pollution Control Officer to negotiate, sign, and amend, as needed, a multi-year contract with Endicott Communications Inc. to provide public and media relations support to District Staff on an as-needed basis.

Director Mike Holmes asked that this item be removed from the consent calendar

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for discussion. He said he was concerned about the use of "multi-year contract" in the action requested section of the Board memo and in the resolution. Mr. Christofk explained that use of that language allowed him to put money in next years budget as a line item for approval rather than bringing the contract back as an agenda item again. It did not mean that the commitment to the contract was for more than one year.

Director Holmes was satisfied with that and moved to approve Item 8.

**Motion**: Mike Holmes, second Kent Nakata, approved unanimously.

# 9. Joint Powers Agreement Resolution for Special District Risk Management Authority: (Consent/Action)

Adopt Resolution #07-05 thereby approving the form of and authorizing the execution and delivery of a sixth amended Joint Powers Agreement with the Special District Risk Management Authority.

### 10. Clean Air Challenge Curriculum: (Consent /Action)

Approve resolution #07-06, thereby authorizing the Air Pollution Control Officer to negotiate, sign and amend, as needed, an agreement with Enterprise for Education, Inc. to present Clean Air Challenge workshops to Placer County teachers in the 2007-08 school year. The costs are not to exceed \$10,000 as provided for in the FY 2007-08 Budget.

Motion for items 9 & 10: Jim Gray, second Kent Nakata, approved unanimously.

#### **Information Items:**

# 11. Approval of the Fiscal Year 2007-08 Proposed Final Budget: (Public Hearing/Action)

Mr. Christofk presented this item due to the absence of the District's Administrative Services Manager, Jane Bailey, who had a family emergency. He gave a power-point presentation showing that the Proposed Final Budget did not change significantly from the Preliminary Budget presented at the June 14, 2007, Board meeting. He said the main difference is that the Proposed Final Budget shows the actual ending balances for FY 2006-07.

The District normally operates on three separate funds, each with their own revenue sources and expenditure accounts. These are the Operations Fund, the DMV Fund (AB2766) and the Mitigation Fund. The DMV Fund and the Mitigation Fund have restricted usage. The Operations Fund has four sub funds: the Non-tort Defense Fund, the Reserve or Contingency Fund, and two new subfunds this year which are the Recovered Litigation Costs Fund and the Settlement Fund. The Recovered Litigation Costs Fund and the Settlement Fund were created

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to hold the amount received from the lawsuit with Sierra Pacific Industries. These funds are shown in the charts as revenues, but as yet have no expenditures associated with them. Pending direction from the Board, Staff will prepare recommendations for the usage of these funds at a later date. Until then, the District will receive interest income from these accounts.

The total proposed funds available for the FY 2007-08 Budget are \$8,372,631 with the fines and settlements fund comprising 42% of the total. These funds are shown in the pie charts but not in the comparisons because there are no proposed expenditures as of yet.

There are some new items on the list of proposed programs, projects and enhancements this year. The District is proposing to add one new full time position, an IT technician, for approximately \$62,000 and to fill an allocated full time vacancy which will bring the total allocated positions to 18. These two functions were previously funded through a service contract which will be reduced accordingly so the fiscal impact will be minimal. Additionally, the District will need to purchase a new server to support our expanding database and business processes which, including licensing and maintenance, will cost approximately \$25,000. Also, we are proposing to have an actuarial study done of the OPEB (other post employee benefits) for \$5,000. The study will give the District a better idea of what its obligations are to that fund over time.

The proposed amount for Clean Air Grants this year is approximately \$1.6 million. Once any Mitigation Funds come in, Staff will submit a budget revision which could increase that amount. In the last seven years the District has given out \$7.9 million in Clean Air Grants. If the Board approves this Budget for FY2007-08, this total will come to \$9.57 million which is 47% of the District's total revenue and 72% of the DMV funds over that period of time.

Since FY 2000-01 the Districts full time employees have grown from 8 to 16. This puts the District at approximately 4.5 full time employees per 100,000 population served. This is about half of what most other air districts in California operate with. The number of Authority to Construct and Permits to Operate submitted has also grown while the turn around time to complete them has become shorter.

Overall in the comparison between the FY 2006-07 Final Budget and the Proposed FY 2007-08 Final Budget there is only a 2.19% change. After Mr. Christofk finished the presentation, he asked if there were any questions from the Board.

Director Gray asked if a substantial amount of the settlement money could be placed in reserve. Mr. Christofk said that his plan was to come to the Board for direction on what to do with the settlement money and to present some

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> recommendations. He said the District used approximately 6,000 man hours (\$700,000 worth of costs) of staff time on the SPI litigation. The recovery costs were set aside in a separate fund from the settlement funds so they could be tracked. He said he would like to use some of the cost recovery money for compliance enhancements within the District and intends to bring that plan to the Board in the future. For the settlement funds, he agreed that some should be kept in reserve, but that he would like to use the money for public benefit. One idea is to offer some incentive money from the interest earned to offset the costs consumers will incur prior to when new rules are adopted. For example, one of the rules being worked on has to do with wood burning appliances. It would be appropriate to make some money available to the public to assist with purchasing EPA certified appliances to replace their older ones. Director Gray asked Mr. Christofk to explain what GASB (Government Accounting Standards Board) is. Mr. Christofk said it is a government agency that sets up requirements for government accounting practices. GASB 45 requires that public agencies set aside money to fund retired employee benefits that may be incurred in the future. The District is not required to participate in the program until 2009, but chose to follow Placer County's lead and began to set the funds aside last year. At this point 6% of the payroll is being reserved. He said it might be a good idea to use some of the settlement money to fund the OPEB fully in order to retire that debt. This is one of the reasons he included an OPEB analysis in the budget.

> Director Gray mentioned that he was glad the District was going to retire two older vehicles and purchase two new hybrids for District use. He asked what the contract with Monterey Bay Unified Air Pollution Control District (MBUAPCD) was for and what the line item for participation with other air districts was for. Mr. Christofk said that the District has had a contract with MBUAPCD for several years to reimburse them for staff time used on the Air Toxics Hot Spot program. MBUAPCD does this analysis since this District does not have the resources to do the work at this time. In the future, Dr. Chang and the planning staff should be able to take over that program. In regard to participating with other air districts, there have been times when the District has been approached to help with technical conferences, public information requests and to participate in public health venues. The money for this will be set aside and may or may not be used over the year, although the District has already been asked to participate in a "Green Technology" and Health Effects Conference this fiscal year.

Director Uhler asked about the new position for IT technician. Mr. Christofk explained that the position was formerly funded through a service contract. By making it a full time position the contract amount will be reduced. Director Uhler also wanted to know if the extra help and contracted personnel were factored in to the full time employee statistics in the comparison charts and Mr. Christofk said they were not. He clarified that there will be 18 full time employees with the addition of the full time IT Technician and the previously vacant allocated position which will be filled in this fiscal year.

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Chairman Jim Holmes opened the public hearing and as there were no comments from the public, closed the public hearing and asked for a motion to approve the FY 2007-08 Budget.

Motion: Mike Holmes, second, Millward, approved unanimously

## 12. Adoption of Rule 411, <u>Indemnification of District</u>: (Public Hearing/Action)

John Finnell, Senior Air Pollution Control Engineer, presented this item. He said the purpose of this rule is to provide protection to the District should any litigation be brought as a result of analysis and/or issuance of a permit by the District.

A number of air districts have been faced with legal challenges either after or during the issuance of a permit. Requiring an indemnification agreement with a permit holder would provide protection to the District. Many other special districts and jurisdictions already have this process in place. In Placer County, the Planning Department requires project applicants to indemnify the County with respect to the approval by the Placer County Board of Supervisors and the Planning Commission for land use projects. Roseville, Auburn, and Loomis have similar indemnifications policies for land use project decisions.

No public workshops were held on this proposed rule. However, public notices were published in the local newspapers at least 30 days before this meeting and notification postcards went out to 393 permit holders. Since a public hearing is required for all new rules, District Staff thought it best to get input from the public and the Board before deciding if workshops would be necessary. The District received letters and comments after the notices went out, two of which are contained in the board packet. The main concern from the public seems to be the wording of the indemnification agreement.

Examples of indemnification language are included in the packet, but each agreement could be worded differently depending on the circumstances. It is the Districts position that the adoption of the rule is a matter of policy and that the actual wording of the agreements would be worked out after the rule is adopted. The examples of agreements in the board packets are based directly on existing agreements in place with other Placer County land use departments.

Mr. Finnell said that since this is a public hearing, the District has County Counsel available to answer questions and provide opinions. He said that the proposed rule is administrative in nature and pertains mostly to the District's legal liability. Staff is recommending that the Board adopt this rule which will require the Permittee to hold the District harmless against certain permit actions taken by the District pursuant to a new rule that would be added to the District's Rules and Regulations.

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> Chairman Jim Holmes asked if there were any comments and Director Uhler asked if he could speak before the public hearing was opened. He stated that he had heard from a number of his constituents and that they would appreciate having public workshops in order to have their voice heard before the adoption of this rule. Director Uhler said mention was made specifically about having an influence on the language of the agreements. Director Mike Holmes, Director Gray, Director Millward and Director Hill all echoed this sentiment. Director Millward questioned why there had been no workshops preceding the board meeting. Mr. Christofk said that it was a policy decision for the Board and that the language issue could be worked out individually. Mr. Christofk recommended that the Board proceed with the public hearing and then provide guidance to Staff. He said there was no compelling reason to adopt the rule today. He did, however, state that even though there is no lawsuit pending against this District, not having a policy in place could be disastrous should legal issues arise. He said that he has intended to bring this rule forward for some time now but the resources were not available until recently to develop it. He said he looks forward to hearing the public comment and County Counsels comments as well.

> Director Hill said that in his opinion, there was not enough detailed information in the analysis to be able to make a decision today. He said there were some serious issues especially in reference to local land use and in the range of Permittee's who are affected. Director Mike Holmes was concerned that the District might become indemnified against Staff errors if due diligence was not exercised in the development of the permit and that the rule would apply to existing permits and not just new ones issued after the rule is adopted. Mr. Finnell said that this hearing was to adopt the policy or rule itself today and not the specific language to be used in an indemnification agreement. Those details could be the subject of workshops in order to reach some comfort level on the part of the District and the Permit holders/applicants.

Chairman Jim Holmes asked if there were any other comments from the Board hearing none, he opened up the public hearing.

There were seven members of the public who stood up to speak in turn. Some were representing their own businesses and some were representing the larger major and Title V sources: Ester and Bruce Ritchie from Loomis; Gary Raskie of Pacific MDF; Joe Irvin of Castle Consulting Group; Ted Guth from Rio Bravo; John Dunlap, representing the California Ski Industry Association and Rio Bravo; and Kathrine Fry from Sierra Pine in Rocklin. Each had specific issues with the rule and the indemnification language. Some thought the scope was too broad and that the permit holders would be solely responsible for defending both themselves and the District and would have no say in any settlements. They were concerned that they could be liable for possible errors made by the District on their permit and were concerned about the fairness of this rule. All of them advocated holding public workshops before the next Board meeting in October. It was suggested that

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separate workshops be held for small businesses and the larger sources since each will have issues specific to the types of permits they hold. A request was made to keep the public hearing open so they could speak again at the October meeting.

Ms. Valerie Flood from the Placer County Counsel's office spoke next. She said that her comments were not intended to sway the Board to decide one way or another on this rule today. She said that she had defended Placer County in several lawsuits of the kind covered by an indemnity clause and if a lawsuit were brought to the District regarding a permit, the Permittee would have to be a named party in the lawsuit. If the Permittee was not named the suit would have to be dismissed. The Permittee is considered an "indispensable party" to a lawsuit regarding any permit they hold and therefore would have defense costs to pay whether they had an agreement with the District or not. She said it is an unfortunate and often costly part of doing business.

Ms. Flood said that in situations where there is alleged District negligence versus Permittee negligence, County Counsel most often finds that there is no actual negligence on either side. What usually happens is that an individual or a group doesn't like or agree with the project and files a lawsuit. The indemnity provision, when applied practically, allows for the defense to represent both the Permittee and the District. The permit is the thing that is being challenged and therefore it is really the permit that is being defended, not the Permittee or the District. With respect to small businesses, if a lawsuit comes, the business would still have to defend the permit even if this rule is not adopted since the permit holder by law has to be named. Essentially, the financial threat exists with any permit holder but this rule would keep the District from having to hire separate legal counsel. Usually the only type of monetary judgment awarded is the attorney fees because the lawsuit is filed to either undo or change what a permit may allow. If the rule is not adopted and there was a monetary judgment it would be made jointly against both the Permittee and the District.

Ms. Flood made the point that permit fees typically do not include potential litigation costs. There are rules about what permit fees can represent and generally they are for processing costs only. She said that a permit is always intended to represent and protect the public. Permit holders do not desire to be regulated and if given a choice, would not be. However, the District, as well as the other land use departments and all entities that issue permits, have a responsibility to ensure that the rules and regulations are followed in order to protect the public interest. If the District has to defend itself because of a permit, then it is essentially the taxpayer who is defending a privately held permit. There are statutes, case laws and opinions of the Attorney General that state it is a matter of public policy for an entity to determine whether the litigation costs associated with granting a permit should be borne by the permit holder or by the general taxpayer.

In a workshop there will be many things that will be discussed and the language of the indemnity clause seems to be the one of most concern. Ms. Flood cautioned

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against adopting a rule that has the actual indemnity language in it and that there should be no "one size fits all" indemnity clause. She said that 60-70% of the indemnity agreements the County enters into amount to a small paragraph on the back of the standard conditions page stating that the Permittee agrees to indemnify the County if there is a legal challenge. The permit language indicates that the challenge has to be to the permit, which represents the Permittee's interests and not necessarily those of the County.

Chairman Jim Holmes brought the item back to the Board. Director Uhler made a motion to continue the public hearing and to direct Staff to conduct public workshops with the permit holders and any interested parties between now and the next meeting to be held on October 11, 2007. Director Hill seconded the motion and had additional comments to make. He said that when this item comes back to the Board, he would need some questions answered. He said that the City of Rocklin does not have this type of indemnification so he is not convinced it is needed for all projects. He said he wants more information on how many districts have this type of wording associated with their permits, what the actual wording is, and how many lawsuits have been filed. He said the staff memo did not provide enough information and he needs to know what type of problem the District is trying to solve with this rule if he is going to vote for it.

Chairman Holmes asked for a vote on the motion to continue the public hearing and to hold workshops for interested parties between now and the next Board meeting.

**Motion:** Uhler, second: Hill, approved unanimously

### 12. Air Pollution Control Officer's Report

There was no fiscal update for month one of FY 2007-08 due to the absence of the Fiscal Manager and Mr. Christofk had no additional items.

**13. Adjournment:** Chairman Holmes adjourned the meeting.

NEXT REGULARYLY SCHEDULED MEETING – Thursday, October 11, 2007 at 2:30 PM